Rubenstein v. Frey Doc. 49 Att. 1

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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IN RE: A MILLION LITTLE PIECES LITIGATION

06 CV 669 (RJH)

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April 6, 2007
10:10 a.m.

Before:

HON. HOLWELL: RICHARD J. HOLWELL,

District Judge

APPEARANCES

BRODSKY & SMITH, L.L.C.
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APPEARANCES:(continued)

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Attorneys for Defendants Random House and Doubleday
BY: MARK B. BLOCKER
MICHAEL ANDOLINA

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Attorneys for Defendant James Frey
BY: DEREK J. MEYER

THE COURT: Please, take your seats.

(Case called)

THE DEPUTY CLERK: Counsel, please state your name for the record.

MR. SMITH: Kevin Smith from Brodsky & Smith on behalf of plaintiff, Michelle Snow individually, and on behalf of the Million Little Pieces plaintiffs group.

MR. DRURY: Larry Drury from Larry Drury, Ltd. on behalf of Marcia Vedral and the putative class.

THE COURT: Mr. Drury.

MR. MULLANEY: Thomas M. Mullaney for plaintiff Diane Marolda.

THE COURT: Mr. Mullaney.

MR. BONNOR: Good morning, your Honor. Jim Bonnor with Shalov Stone Bonnor & Rocco for plaintiff Sarah Rubenstein.

MR. MEYER: Good morning. Rick Meyer on behalf of James Frey.

MR. BLOCKER: Good morning, your Honor. Mark Blocker on behalf of defendant Random House.

MR. ANDOLINA: Good morning, Judge. Michael Andolina, also on behalf of defendant Random House.

THE COURT: All right. This is -- and who do we have on the phone, counsel?

MR. TAYLOR: Chris Taylor, counsel for plaintiff

Hauenstein.

THE COURT: Okay. This is a motion for preliminary approval of a settlement and for certification of the class. I've read the papers.

There are some issues in dispute which I'm prepared to hear from counsel on briefly. Perhaps one of the three proponents for the motion might briefly address it.

MR. DRURY: May I use the podium, your Honor?

THE COURT: Yes, feel free.

MR. DRURY: Thank you.

Please the Court, counsel, as I said, my name is Larry Drury. I'm here on behalf of plaintiff Vedral and the putative class.

Your Honor, having stated that you've read all of the materials, I'd just like to briefly highlight a few points if I may.

THE COURT: Yes.

MR. DRURY: As the Court is aware, this case has to do with the book known as A Million Little Pieces, which was written by one James Frey. It was published in hard cover form in 2003, and in 2004 and five came out in paperback form.

One of the questions that arose as a result of this book was the misrepresentations or embellishments or however the Court deems appropriate as to what was said. For example, there were statements in the book as to Mr. Frey having been in jail for three months, when it was three days; his girlfriend having died, when she didn't; having a tooth removed without any anesthetic.

As time went on, it became clear that, indeed, that was not the fact, and as disclosed in the smoking gun in 2006 in the Larry King show, and in January 26 of '06 on the Oprah Winfrey show, with tears in her eye, James Frey came forth and said that it wasn't exactly accurate.

Now, that's a very brief background what gets us here today. As a result of that, there were lawsuits filed all over the country. They were eventually gone to the MDL and they were consolidated and transferred to your Honor.

The matter's now before you for preliminary approval of the settlement, approval of notice, approval of class counsel and class representatives.

Interestingly, your Honor, that since all of this took place, the book itself still remained on the best seller list for some 26 weeks subsequent to January of '06. There was also sales that exceeded some 93,000 books. And the comments that came in, as we've seen with respect to the books, were more on the favorable side than critical. And I think it's important to note that, indeed, it remained on the best seller list. And why I mention that and these 93,000 in sales and less than 250 returns of the book is one of the reasons that we're here for settlement, because there is a lot of questions as to how the public and the class, which we seek to represent, has reacted to all of this. And the reaction seems to be, in some part, that they weren't substantially concerned. There was only 250 returns of the book.

Now, a little additional background, your Honor. We formed the plaintiffs' group early on, and it consisted of some 12 firms. Now there's two that are no longer with. One is on the phone, Mr. Taylor, and Mr. Bonnor is here also. And we had meetings with the defendants. I attended them personally. Mr. Smith was there on one occasion; he was there telephonically. We negotiated at arm's length what we considered a fair, reasonable and adequate settlement.

We met in Chicago many many times. We went back and forth. We had numerous disputes as to where we stand and where we stood with the position. We insisted on confirmatory discovery. And the confirmatory discovery consisted of sales returns, pricing, royalties, review of some 2,000 documents and declarations from three or four sources as to the sales of the books, the returns of the book and the royalties which Mr. Frey took into place. These negotiations began in around April or -- March or April or so, and we entered into an MOU, a memorandum of understanding July 26, '06.

In between, we've done substantial work in drafting the pleadings, responding to would-be objectors, going over the notice, continual discussion with the defendants in attempt to resolve the case.

We believe we have put before your Honor what we consider to be a fair, adequate and reasonable settlement well within the range of reasonableness which would allow the Court to grant the preliminary approval so that notice could go out to the class and the class could be made aware of what the settlement is, have an opportunity to respond, to exclude themselves, to object, to make a claim, and/or attend the final fairness hearing if your Honor decides to preliminarily approval the settlement today.

What does this settlement consist of? I'm going to just highlight a few matters. One, there's a total fund of $2,350,000 that is the settlement fund. That fund is available for all class members to make their claim. And their claim consists of a claim for the refund of the price of the book regardless of what format it's in, hard cover, CD, paper back, they will get a full refund, including taxes and if it was by internet, shipping charges I believe are also included in that. The maximum amount --

THE COURT: They'll get a full refund if there are only a limited number of claimants, right? If all purchasers were to file claims, their recovery would be something in the range of 75 cents.

MR. DRURY: Well, if there -- if the claims exceed the total value of the fund, yes, there would be a pro rata reduction in the value of the claims that each class member would get, that's correct.

And the $2,350,000 doesn't only include the refund possibilities for the class, but also includes any attorneys fees, costs, administrative costs and any other items such as that, which is set forth in our moving papers which would be deducted off the top of that $2,350,000. So we don't know, and I don't know as I stand here, what the take rate is going to be; in other words, how many claims are going to be for class members, but the way it's structured that is the full fund that is available to the class. As part --

THE COURT: Tell me, then, why the Court should consider this amount to be within a range, a reasonable range for settlement.

MR. DRURY: Our review of the financial records and sales and returns and items such as that, your Honor, reveals that the gross sales for these books would be around $55 million; generally discounted at 20 percent would be about $44 million. It's our understanding from our discovery with the defendants that that gross price is the price that's being sold to the consuming public, but the price that the defendant, Random House, for example, would have received would be one-half of that. So when they saw it on the market it's double. So that would take the 55 down to 22, or on the discounted side if it was 44, it would take it down to --

excuse me -- 27 would be 22 on the 44, 27 on the 55. Then there would be the royalties that are involved, which were some $4 million, which take it down to about 23, five on the gross sides and about 18 on the discount side.

Then we'd have to calculate -- and we did as best we could -- what the profit would have been for the defendant based on those numbers, and we were looking at a profit of around 25 or 30 percent. So that drops the number on the gross side from 55 million to $5,825,000. On the discount side on the 44 million, it would take it down to about 4,500,000.

Now to that equation, in looking to the risk involved in litigation as opposed to resolution by settlement, balancing those risks, weighing them, the possibilities of appeals, possibility of a prolonged trial and lengthily discovery, we had to put that into the equation the possibility of winning and the possibility of losing. I believe that 50-50 down the middle is where we would be. And if you apply that 50 percent to these net numbers, that takes us down to the two million seven, two million nine, two million four range. That's how we got to the $2,350,000 your Honor.

There's also another factor which I didn't include into that calculation, but the defendants contend that we should really take off maybe 10 percent from these numbers because only 10 percent of the book was embellished by falsities and misrepresentations -- of course those aren't their words, their words are embellishment, my words are misrepresentation -- as made in the book by Mr. Frey, and that would reduce it further.

So, considering all of those criteria, at this juncture of the proceeding we feel as advocates for this settlement that it would be in the best interests of the class to settle it at this time for this amount of money.

Now, included in the settlement -- your Honor I'm sure saw that there's a cy-pres provision, I'm not going to go through all the details, and of course that will be up to your Honor to finally approve, should you approve this settlement, where the cy-pres distribution should go.

We've provided for notice. The notice to the class is by way of direct mail for those persons that Random House has the addresses for. We've also provided for publication notice in Parade and U.S.A. Weekend. There will be two publications which will reach 50 states, 962 papers, and about 55,400,000 in circulation.

We also looked at the fact that there's been a lot of publicity and public attention to this. And as we noted in our moving papers there were comments on CNN, the Wall Street Journal, the New York Times and the web sites that are currently in place have for the settlement alone, over a 1,090,000 hits already of people showing interest in what's going on here. So we have mail, we have publication, we have the internet site.

THE COURT: How many purchasers would --

MR. DRURY: Excuse me?

THE COURT: -- receive direct notice?

MR. DRURY: I don't have an exact number. I believe the defendant is going to address the total amount in there. I don't know whether it was a thousand -- I really don't recall. It's not that I don't know whether it was a thousand or under a thousand that will receive the direct mail notice from Random House.

THE COURT: Did the plaintiffs consider a more expansive direct notice?

MR. DRURY: Of course, your Honor. We considered all aspects of what would be the best notice practicable under the circumstances.

And while we're on the subject, I know that one of the concerns expressed by the objector was, well, maybe we should have sent subpoenas out to third parties to get their customer list. And I know of no cases or any law that would insist or that would require any of the parties, plaintiffs or defendants, to impose upon third parties by way of subpoena to disclose their customer list, which they probably watch over very closely and are protective of, it's business, it's their customer lists or, alternatively, to require them to have to go and make those lists and then first send them out. This is not like a securities case, which was referred to by the objectors. In the securities case we're dealing with brokerage houses and records and nominees, and fiduciary relationships and regulations where there's a requirement to keep such records. In this instance with retailers, for example, there is no requirement that they must maintain lists and --

THE COURT: There are some non parties -- there are some parties, rather, defendant parties who are retailers. They're not parties to the settlement agreement, but --

MR. DRURY: Yes.

THE COURT: -- are they still parties to the litigation?

MR. DRURY: Yes. There's a -- some of the numerous complaints joined retailers as parties, and the release in this case would absolve them. They would be considered released parties. But that's one of the prices that when you're negotiating a settlement that you literally must consider to purchase peace. And in order to bring closure to this case in a res judicata effect when the notice goes out and the class responds, and to bring this matter to a conclusion, that was one of the issues that we negotiated. It's not as if, your Honor, that if the defendants said we're not going to do it, plaintiffs' counsel said okay. Far from it. We fought long and hard with these defendants and their counsel to get where we were at today.

But in the end, sending out subpoenas to third parties was just something that we feel is unreasonable, it would be overly burdensome, and it would create probably chaos in the courtroom considering that maybe all of these retailers will then have counsel coming in here and objecting, probably for some of the very same reasons that I'm now advocating to the Court.

So, publication, as in the cases Agent Orange that we cited and Compact Disk in our reply brief, and that type of notice and the Malane, that even though it may be possible that you could have some type of a direct notice, in the whole sphere of things, publication, as those cases indicated, was the way to go, and they did not require notice. And I suspect that the number of people with agent orange, for example, were more than the number of potential class members in this case.

Additionally, your Honor, I would like to note that with respect to the settlement, I want to go back, that there's a disclaimer that will be in the books that states, not all portions of the book are factually accurate, which will now be in the Random House books, as well as a publisher and author's note which is already in there in the books.

We've provided for claim forms. They can download it, they can call into an 800 number.

I've discussed the bases why the Court, we believe, should approve it. And really the criteria at this stage is, of the proceeding is is it within the range of fairness and reasonableness. We believe that it is. And, again, we weighed the factors, we weighed the risk, appeals, litigation, et cetera, and this is what we're advocating.

Lastly, your Honor, class certification. Why should this class be certified. The elements of numerosity commonality, typicality, adequacy of representation, superiority, manageability, and that this is the best vehicle with which to proceed with this case I believe are all here. I don't think numerosity is a dispute.

THE COURT: I don't think anyone, at least for settlement purposes, contests the fact that this should be a class action.

MR. DRURY: All right. Then the only other matter that I have, Judge, is this, and your preference of course will prevail. I can respond, and I have, in part, to the comments and objections, if you will, by Mr. Bonnor and his client, or preferably I could wait to hear what he has to say and then I would like the opportunity to reply, if that suits the Court.

THE COURT: All right. Thank you, Mr. Drury. I think I'll first hear from the other supporters of the settlement, the defendants to see if there's anything they wish to air now.

MR. DRURY: Excuse me, your Honor. I'm sorry. I would like to present --

THE COURT: Yes.

MR. DRURY: -- to the court, if you approve the -- preliminarily approve the settlement, suggested dates for claims, exclusions, opt outs. There's the notices are also attached, as well as an order of preliminary approval.

THE COURT: Thank you.

MR. DRURY: Thank you. Amended notice. I'm sorry.

THE COURT: Thank you.

Do defendants wish to add anything to the comments of Mr. Drury?

MR. BLOCKER: Judge, we don't wish to add anything. I would just point out one thing. The motion for preliminary approval is actually brought by the plaintiffs. We have actually taken no position with respect to preliminary approval. We're leaving that totally up to your Honor.

With respect to your question about how many purchasers would get direct mail notice, it would be a small fraction of the class, but that's because those are all the addresses that we really have.

THE COURT: Yes, I understand.

All right, Mr. Bonnor, would you like to address the motion?

MR. BONNOR: I would, your Honor. Thank you very much. As I said, my name is Jim Bonnor. I'm with Shalov Stone Bonnor & Rocco. We represent plaintiff Sarah Rubenstein. With my co-counsel Kalcheim firm.

My firm's here today and our client in order to protect the interests of the millions of class members that Mr. Drury has described, who will not receive any practical notice at all of the settlement.

THE COURT: Let me ask you whether you're objecting or your client's objecting to the amount of the settlement. I didn't really see that in the papers, but I wanted to confirm or to make explicit your client's views on the adequacy of the settlement, leaving aside notice issues.

MR. BONNOR: I think, your Honor, if you were to approve the notice campaign in the shape that it's currently in, settlement would be an adequate settlement because no one is going to respond to the notice.

However, if we undertake an adequate notice campaign, we're going to get many many class members to respond to that notice and there are going to be a large number of claims. They're providing for a hundred percent recovery, as Mr. Drury said, on behalf of the class members, and in that circumstance if you were to adopt the notice campaign, which I'll advocate here today, your Honor, I think that the settlement would be inadequate under those circumstances.

THE COURT: All right. Proceed.

MR. BONNOR: There are two guiding principles of course as to what constitutes adequate notice in class action. There's Rule 23(c)(2), which says that you're supposed to give adequate notice what's reasonable under the circumstances. And what's reasonable under the circumstances means personal notice to everybody who can be identified with reasonable efforts, your Honor. That's the exact words of the rule.

And in addition to that, the Supreme Court has told us over and over again in Eisen and Schuts and other cases that it is a constitutional right of the class members to be informed personally of the terms of a settlement and their right to make a claim in a settlement in the event that they can be identified.

And the MLP group would have you think, your Honor, that there was no way for them to identify who the members of the class are, other than the 1,000 or less class members who purchased their book directly from Random House. But that's obviously incorrect, your Honor. That is absolutely untrue. You've already pointed out today that there are parties in this litigation, parties in this litigation who undoubtedly maintain lists of their customers.

THE COURT: They're not parties to the settlement agreement.

MR. BONNOR: I'm not sure why they're not parties to the settlement agreement, your Honor, but --

THE COURT: Well, they're not parties to the settlement agreement, I think it's fair to conclude, because they don't believe they have even sufficient exposure to plaintiffs' claims to warrant their signing a settlement agreement.

MR. BONNOR: But that's all well and good, your Honor. They don't to have contribute to the settlement. The issue is whether it is easily available to the parties in the litigation so the plaintiffs in this litigation, and for your Honor to order the parties in this litigation to provide the notice that is mandatory, mandatory under Rule 23 and a constitutional right under the Supreme Court.

THE COURT: Well it begs the question. What's mandatory is what's reasonable.

MR. BONNOR: What's reasonable, your Honor. It's -- the rule says what's reasonable, but the rule also, your Honor, explicitly says that what's reasonable is personal notice, not publication notice, personal notice to every class member who can be identified with reasonable efforts.

Now what reasonable effort would be required to turn to Barnes & Noble or to Anchor Books, who are defendants in this litigation, and to say here, you're going to do the same thing that the people at Random House are going to do, you're going to provide notice to those people who bought directly from you.

THE COURT: And who is going to pay Random House to do this -- I mean, Barnes & Noble, rather?

MR. BONNOR: Well, your Honor, my guess is that it would cost very little money to -- as a starting point. But we're stuck with the terms of their settlement. Under my world, the way things are usually done in consumer class actions is the defendants pay for this notice. That's typically what happens. In fact, I can't remember any settlement -- and I've been doing this for 15 years now, in a consumer case where the defendants didn't pay for notice, and where the costs of that notice --

THE COURT: Let's assume that the Court concludes that the settlement amount of 2.35 million is very beneficial to the class members, given the risks that the claims might be dismissed on a motion to dismiss or the class might not be certified due to individual issues of reliance. Assume I reach that conclusion, then the question becomes if there's $2.35 million in a pot, how much money do you believe should be spent on notice in this case?

MR. BONNOR: First of all, your Honor, I don't know exactly how much would be required to provide notice. My guess is it would be very little. Because most of these people have e-mail addresses for their customers, and so we could do something that's a little bit innovative in this case where the settlement amount that you're talking about is relatively small, and we could provide people with personal notice by e-mail. It's a perfectly legitimate form of providing people with notice. You could direct them to the website that Mr.

Drury has spoken about today, and for a very minimal amount of money, we could identify hundreds of thousands, if not millions of class members who purchased this book and have a right to make a claim in this settlement. So that's a very small amount of money, your Honor. In addition to that --

THE COURT: Now, are you talking about a campaign that would require retailers who are not even parties to this litigation to join this program?

MR. BONNOR: Yes, your Honor. And --

THE COURT: And how would you do that?

MR. BONNOR: Well, there are two ways. We could do it voluntarily, which often happens in class actions -- and I'll go through some cases that talk about that if you like, your Honor. In addition, we could easily subpoena these customer lists. We could simply get, for example, from Amazon.com, it's one of the most sophisticated retailers in the universe, they have all of these people's e-mails.

THE COURT: So you don't think there are any First Amendment concerns in subpoenaing Amazon.com's customer lists for a particular publication?

MR. BONNOR: No, I don't, your Honor. I don't think that there is a legitimate First Amendment concern. In fact, if you were to read the Tattered Cover case, which is the case that the defendants relied upon most heavily in advancing this argument -- which I would note was not mentioned at all in the papers that were supplied in support of the settlement, didn't come up until after we had raised this issue -- but in any event, in the Tattered Cover case the Court explicitly decided that it had to turn to Colorado law in order to find that there was some protection for the list of purchasers or the individual who purchased the book that was at issue in Tattered Cover, because the Tattered Cover case points us to a number of Supreme Court cases which have said, essentially, that First Amendment rights of the various individuals have to give way in appropriate circumstances to other legitimate interest that litigants may have. And I would point out, your Honor, that there are --

THE COURT: And so here you're weighing the rights to privacy, if you will, and the rights to, I suppose, to read what you like without advertising it, against the adequacy of notice. Those are the two considerations you're weighing here, right?

MR. BONNOR: That's exactly right, your Honor. Those are the two considerations.

And what the Tattered Cover case told us is Supreme Court precedent dictates that in these circumstances -- in the circumstances at issue in that case where they were looking to find out why a certain person read the content of that book, that even in those circumstances where the issue was the content of the readers, the book that they read, the Court said that the First Amendment would not, in all likelihood, provide any protections in those circumstances. The Court had to turn to Colorado law. And interestingly again, your Honor, in the Tattered Cover case, what the Court said, again applying Colorado law, was that in circumstances where we were searching for a book purchaser, in circumstances where we're not really interested in what the subject matter of the book is, we're just interested in the identity of the person who purchased that book, that in those circumstances, even under Colorado law there would be very very low interest in protecting the identity of that individual; that the First Amendment or the privacy issues that were raised in those circumstances where we're searching for the identity of a person, not the contents of the book that they read, it would not be a protected interest.

And what has the Supreme Court said about this issue? There have been many cases in the Supreme Court balancing First Amendment rights against the rights of litigants. Interestingly, your Honor, there's certainly no case in which a constitutional right, a constitutional right to due process by class members, and when Congress and the Supreme Court have dictated people are entitled to individual notice, no case decided that in those circumstances that a First Amendment right to remain private --

THE COURT: You seem to be premising your argument on the assumption that individual notice is the only way, only constitutional way to provide notice of a class action. That's just not the case.

MR. BONNOR: But it is the case, your Honor. In circumstances where, with reasonable effort you can identify the class members, Rule 23(c)(2) says absolutely, positively, unequivocally that if you can identify those class members you are mandatory, you have to provide them with personal notice. And the Supreme Court has told us in Eisen, they've told us in Schuts, that that is a due process right, it is a constitutional right of the class members. If they can be identified through reasonable efforts, they are entitled to personal notice in those circumstances.

THE COURT: All right.

MR. BONNOR: Now, the Supreme Court -- getting back to the First Amendment issue -- there's a Zercher versus Stanford Daily News I believe is the case. That's a case that's mentioned in the Tattered Cover case. There the Supreme Court said that when you have a search warrant, we can force a journalist to provide photographic evidence that was not published publicly. That's a very important First Amendment right, the right of freedom of the press. And the Court said in those circumstances, the right of the government to find out the individuals who perpetrated certain violence at a demonstration, outweighs the First Amendment right. There is another case called Branzburg versus Hayes, it's a venerable old First Amendment case. And in that case the Supreme Court said, we have a circumstance where we have journalists with confidential sources who have not been made public, and the Supreme Court says in that circumstance the government is entitled to find out the identities of those confidential sources.

THE COURT: And what was the reason that this was disclosed?

MR. BONNOR: The reason why --

THE COURT: Countervailing reason.

MR. BONNOR: The Court said in those circumstances that the Government's interest --

THE COURT: What was the Government's interest?

MR. BONNOR: It's in prosecuting these individuals.

THE COURT: Yes, I mean that's a little different than the situation we have here. Don't you think that a hypothetical class member in a situation in which he's purchased, say, a quite controversial book, either of a political nature or perhaps a moral nature, would be hesitant to have his purchase made public for the purpose of protecting his right to get a notice that he might have a claim against the publisher?

MR. BONNOR: There is no doubt, your Honor, that there may well be circumstances in which a class member might prefer not to have his or her name disclosed in those circumstances. This is not, however, one of those circumstances, and --

THE COURT: Well it may be. People may be quite sensitive about whether they're drug users, whether they've been in rehabilitation, whether they're reading this book for those types of reasons.

MR. BONNOR: This is the runaway best seller of 2004, 2005, your Honor. I believe it was the second --

THE COURT: It's a good book?

MR. BONNOR: Well, I don't think it was a good book. But behind one of the Harry Potter books, the most highly sold book of 2004, 2005. There really is no negative connotation that comes along with being one of the masses I believe, your Honor.

THE COURT: Okay.

MR. BONNOR: So when we have a weighing test, I think your Honor points out a good point. If you take the Tattered Cover case, for example, your Honor, there they were looking for someone who had purchased the book about making methamphetamines. Now certainly if you're the, you're the defendant in that circumstance, that's a private matter. You don't want anyone to know that you're out purchasing books about making methamphetamines.

This is not that circumstance, your Honor. The courts have weighed the interest in those circumstances and they've come out consistently, consistently in favor of disclosure. And I'll point out --

THE COURT: I understand your argument. I would point out you're weighing, on one hand here, the adequacy of notice of a class settlement as opposed to many of these cases we're talking about state's rights to prosecute wrongdoing.

MR. BONNOR: And --

THE COURT: It's a little bit different.

MR. BONNOR: What I would point out in that circumstance is there are many many circumstances in which the state's right or the Government's right to prosecute individuals has to give away to constitutional rights.

THE COURT: I understand.

MR. BONNOR: We have Fourth Amendment rights, and the courts have said over and over again we can't violate Fourth Amendment rights in order to prosecute people.

We have Seventh Amendment rights, and the courts have said, of course we can't violate those rights in order to prosecute people.

Here, your Honor, we have a constitutional right. We have a Fifth Amendment right to due process we have a Fourteenth Amendment right to due process. And the Supreme Court has told us that what those constitutional rights mean is that class members are entitled to individual notice.

So I think that in doing the weighing that we're talking about here, the very minimal, minimal imposition that we have on First Amendment rights here, where we have a best seller, the most highly sold book in 2000 -- second most highly in 2004, 2005, the very minimal imposition on First Amendment rights. And, your Honor, what I would say also is --

THE COURT: Why don't you -- I think I understand your First Amendment argument. Why don't you address any other objections you have to the settlement.

MR. BONNOR: If I could just very briefly on the First Amendment point, your Honor. I don't mean to take up your time, but just very briefly. I'd like to say Random House is sending individual notice to the people who purchased from them.

THE COURT: Yes, they voluntarily agreed to do that as a party to the settlement. That's a little bit different from requiring non parties to the settlement to either divulge their customer lists with respect to specific books that have been purchased, or in some manner to require them to distribute a notice.

MR. BONNOR: The --

THE COURT: So I think I understand your First Amendment issue. Let's move to the other ones.

MR. BONNOR: The First Amendment right in those circumstances belongs to the customer, your Honor. It doesn't belong to Random House. The issue is they're willing to --

THE COURT: Yes, that's --

MR. BONNOR: -- send out notice to their customers. The customers are in the very same position, vis-a-vis Amazon.com.

THE COURT: Yes, of course Random House isn't divulging anything to anybody else by sending a notice to their customers. That wouldn't be the case if you took the little shop around the corner and said give me your customer list because we're going to send a notice to your customers.

MR. BONNOR: And in those circumstances, your Honor, what courts generally do; for example, there was a recent case here against Jenkens & Gilchrist. It arises out of the KPMG tax frauds. And what the court did in that circumstance is it required the defendants in that case to send out notice to the customers. And what your Honor is certainly empowered here to do and what is done in every single securities class action, hundreds every year, thousands in the course of history, is you require the people who are in possession of these customer lists to send out notice. And you could look at the web site of any claims administrator and you're going to find hundreds, hundreds of cases in which people are being required to send out notice, if they want to keep confidential their customer lists, which is certainly a legitimate reason for them to do that, but that does not interfere, your Honor, with your ability to require them to do it, or an absolute minimum, at a absolute minimum, the champions of the class should undertake some effort to try to get those people to send out notice to the class.

THE COURT: All right. Thank you for addressing First Amendment issues. Let's move on to the other ones.

MR. BONNOR: The other issue, your Honor, is this question about whether we can require third parties or somehow or other ask third parties to participate in the notice campaign. And the most recent case that I could find, the best example of this, your Honor, is Judge Gleeson's decision in the Visa check, Master money litigation. You probably remember that case. It was brought by Walmart, it was an antitrust case. They were alleging that there was certain price fixing. And what Judge Gleeson required in those circumstances was for the plaintiffs to go out and subpoena records from 81, 81 different entities that issued Visa cards or Master cards to retailers. The Court required the plaintiffs to do that in order to provide notice to the class members. And what the court also said is, the defendants will send a letter to every one of those 81 entities and they will ask them for their cooperation in providing notice to the members of the class. And in addition, what the court said was reasonable in those circumstances was for the plaintiffs to fight up to 20 motions to compel --

THE COURT: I'm sorry, is this the same point or is this a different point?

MR. BONNOR: This is the point, your Honor -- they say you can't possibly ask third parties to provide any information that will assist us in providing notice to the class. And what I'm saying is in that case the Court required them to --

THE COURT: I understand that there is nothing prohibitive in writing a letter to somebody asking them to do something. That act, in itself, is not prohibited.

MR. BONNOR: No, your Honor. I'm not saying that the Court -- the Court didn't ask anyone to write letters. What the Court asked or required -- ordered the plaintiffs to do in the Visa Master money case was to subpoena records from 81 different entities, required the defendants to write --

THE COURT: Yes, the issue to me isn't whether or not it's a burden to issue 81 subpoenas. The question is whether or not it's appropriate in this case given the First Amendment issues that have been raised.

MR. BONNOR: I think they're are two separate issues, your Honor. The first issue is whether it's practical under the circumstances to identify class members. And it certainly is practical to identify class members. We know that there are entities out there with long lists.

THE COURT: All right, I think --

MR. BONNOR: The second --

THE COURT: I think we've established -- you've established all your points as helpful as you can. So I think we're simply going at it from a different angle. If there's some other issues that you want to address, please do.

MR. BONNOR: What I would like to do -- if your Honor wants to hear, I would like to do this, but if your Honor is sick of hearing from me I'll certainly sit down at this point in time. They cite a number of cases where they said --

THE COURT: No. What I simply don't want you to do is repeat yourself.

MR. BONNOR: They cited a number of cases, your Honor, the plaintiffs, where they said that courts decided that it was impracticable to provide notice to the class members. And I would say, your Honor, that if we were to read those cases, that every one of them suggests, in circumstances which are similar to the ones that we have at issue here, that the plaintiff should be required to go out beyond the limited means that they have available to them at this point in time and to look outside for other sources of lists of class members in order to provide notice to the members of the class.

Mr. Drury cited the Agent Orange case. In that case it was impossible to identify every one who had been in Vietnam and exposed to Agent Orange. We did not know where agent orange had been dropped, we didn't know who had been exposed to. What the court required in those circumstances was to send out notice, your Honor, to hundreds of thousands of class members who had contacted the Veterans Administration and to provide them with notice. It also required the litigants to go to the governors of every single state and to obtain from them a list of people who had contacted various state agencies regarding Agent Orange exposure and to provide those people with notice of the settlement in that litigation. So Agent Orange, that's their case, suggests that precisely the opposite should be done of what's being done here. They cite this the Lucas v. Kmart case. I believe that's a case that Mr. Drury cited, although I may be wrong about that. That was a circumstance in which a class action was brought on behalf of people who were handicapped who utilized either wheel chairs or scooters to get around Kmart. In that circumstance it's impossible to identify everyone in the United States who utilizes a wheelchair or a scooter to get around Kmart. What the court required in that circumstance, and found reasonable, was to go out and find a list of 200,000 people who had registered with various marketing agencies as people who utilized scooters or utilized wheelchairs and required notice to be sent out to all of those people who could be found in that list. That was not a list that was in possession of the parties. It was a list that was in the possession of a third party. The Court found that was reasonable under the circumstances. Another case that they cite, their very own case, your Honor, the Sarasone Products case is a case that deals with a drug damages, injuries resulting from exposure to a drug. And what the court did in that circumstance is, we can't determine who it was, every single doctor in America who prescribed this drug to people, but there is a list that's maintained by the government, which is negative occurrences reports. We're going to require notice to be sent out to every single person who is on that list. And, in addition, the defendants in that case had been contacted by thousands of doctors who say that their clients have been injured. We're going to require notice to be sent to every one of those doctors and to require or to request in those circumstances that those doctors identify their clients and send them notice of this class action.

So there are many many cases, your Honor, many cases where we're reaching beyond what's available to the parties without doing any discovery and without undertaking any effort whatsoever and requiring them to send notice to the class.

And one last thing on notice that I'd like to say, your Honor. They're advocating that they published notice in these publications. It's U.S.A. Weekend and Parade Magazine. And we have a whole room full of people who are involved in prosecuting class actions. And this weekend there was one notice published in Parade Magazine. Now, does anyone know what that notice was? No. No one knows what that notice is because no one's going to read this notice, your Honor. It had to do with seratin, the drug seratin. There is a notice that's set forth right in the middle of this document. It's right next to all the Great All Americans, which was why I was interested in it. You know, I was hoping somebody was going to Rutgers, but no one is. But the point is, your Honor, that the notice that they're proposing in this circumstance is not going to reach anyone. No one is going to read it.

I've been involved in many many class actions. Nobody calls up my firm and says I read your notice in the Wall Street Journal today, I read your notice here or there. Those notices are published for due process purposes. It's necessary --

THE COURT: You think they're a waste of time, I take it.

MR. BONNOR: They're a waste of time and they're a waste of money, your Honor. There are much much more effective ways to reach the members of the class in this litigation. And if the parties had undertaken any effort whatsoever to identify those class members, they could have done it economically and they could have done it much more efficiently.

I would point out, your Honor, just the last thing I like to say on this issue is we're dealing with retailers who really could be served well by providing notice to their customers.

THE COURT: How many book retailers are there in the country?

MR. BONNOR: This is a very concentrated industry, your Honor. What's reasonable under the circumstances, you've pointed that out, we have, as my little bit of research on this -- the publishers might be able to put some more insight into it -- my researchers indicated Barnes & Noble has a 15 percent market share, Borders has about a 14 percent market share, and so we're dealing with a very -- Walmart is a huge book seller, Amazon.com obviously is a huge book seller, just those three, four, five we could probably identify 50 percent of the members.

THE COURT: Would that be sufficient in your view?

MR. BONNOR: Your Honor, I don't think it is practical in this circumstance to go out and subpoena records from every corner book store. That's not possible. But we're dealing with something that will be infectious. When you get out on the internet this notice and you provide people with e-mails and it says you can get $25 back for buying A Million Little Pieces, they're going to send it to their friends who they know read it and this notice is going to be spread throughout the world, and a lot of class members are going to become aware of it, certainly a lot more than that are going to read it in U.S.A. Weekend. No one is going to read this notice, your Honor. And so as a result of that we have constitutional concerns, we have the unequivocal words of Rule 23(c)(2), we have the Supreme Court saying that people are entitled to individual notice. And I cited to you all these various First Amendment issues. I won't go back and repeat that.

And the last thing I would like to say deals with the preliminary approval. Of course your Honor knows that Rule 23(g) requires you in a circumstance where you're going to grant approval or certification to a class that you have to choose counsel for the class, and I think you've put off that issue. Previously you made Mr. Mullaney interim lead counsel. We pointed out in our papers that the --

THE COURT: No, I appointed him liaison counsel. I haven't ruled on the class counsel issue.

MR. BONNOR: We've pointed out in our papers, your Honor, that the papers that were submitted by the plaintiffs in this litigation were filled, every single paragraph, with typos and mistakes. It was something that at my firm would never ever leave the door. I can assure you under absolutely no circumstances would those papers leave the door.

And we've also submitted to you, your Honor, our firm resumes. It explains to you the various experience that we have. It is a great deal more experience than these gentlemen have here. And just last week we've obtained a settlement in Massachusetts, $60 million in a securities class action before Judge Saras up there. It's an unusual issue dealing with liability on, under 10(b)(5)(a) and (c), something that's now before the Supreme Court on certiorari. Just two weeks ago in

Judge Daniels' courtroom we received approval of a $20 million settlement in the Winstar Securities litigation. And again, your Honor, that's just something that's happened since we submitted our papers. There's a long list of successful cases that we've prosecuted that are set forth in our papers. I won't go through all of those things.

But what I would like to close by saying is the class deserves to have a champion in this case who is going to look out to protect their rights. That has not been done thus far. There are hundreds of thousands, if not millions of class members who will receive no notice if what is being proposed by the MLP group occurs, and I think your Honor should take that into consideration in appointing lead counsel and in deciding whether to preliminarily approve this litigation. Thank you very much, your Honor.

THE COURT: Thank you, Mr. Bonnor.

Mr. Drury, would you care to respond?

MR. DRURY: Yes, your Honor. Thank you, your Honor. I will be brief.

Rule 23 is quite clear. That provides for the best notice practicable. We believe that our notice that we've recommended meets constitutional muster; publication is the way to go, the direct mail and the internet. Simply put --

THE COURT: Why would it be difficult for class plaintiffs to provide a form of notice to the major retailers and ask them to distribute it to the customers, their customers whom they're aware of purchased this book?

MR. DRURY: Well, first, your Honor, I believe it's an undue burden. It's not one that the plaintiffs with defendants couldn't do, but I think it would be unreasonable, as I suggested before, and burdensome to go to third parties that are not even parties.

THE COURT: I'm not talking about issuing subpoenas and getting involved in tangential litigation over subpoena enforcements. I'm simply saying contacting Barnes & Noble or Borders and requesting them, not to hand over your list, but simply to e-mail to their customers a copy of the notice.

MR. DRURY: Because I think that is doing indirectly what we say can't be done directly, and we get back to the constitutional question of getting into First Amendment rights. When people read books, when people get books they have the right to receive it, take in the information, and do it being anonymous. Just questions --

THE COURT: Yes, they're not anonymous vis-a-vis the seller. They're anonymous vis-a-vis the public, which is a decent argument for not issuing subpoenas to require purchase list to be turned over.

It's a different matter where you're asking the publisher, on a voluntary basis, to, without any change in the confidential relationship, if you will, if that's what one could call it, the anonymity, if you will, of the purchaser of having that seller distribute the notice.

MR. DRURY: Well first, your Honor, it's highly unlikely, and defendant can address this better than I can, that they are going to do that, unless so ordered by this Court as part of this resolution.

As from the plaintiffs' perspective, I have never seen it done where, in a case, in a consumer case such as this, where you would go ahead and send a letter, let alone a subpoena, to the parties that are not parties, the third parties that are not even parties to the litigation itself. Because when you send out a letter, whether it comes from the plaintiffs or the defendants suggesting that they give us information with respect to --

THE COURT: That's why I'm not suggesting that you write a letter to Barnes & Noble and ask them to give you anything.

MR. DRURY: Well, then what is the Court suggesting? Maybe I --

THE COURT: No. I'm suggesting that -- I'm raising a question as to whether it wouldn't be feasible simply to ask Barnes & Noble to forward an e-mail or send an e-mail which contains the class notice to any purchasers that it can readily identify who purchased a book.

MR. DRURY: At whose expense, your Honor?

THE COURT: Well --

MR. DRURY: Who is going to pay? Let's say --

THE COURT: Well, you tell me, what is the expense?

MR. DRURY: Well, the expense for Barnes & Noble, for example, to e-mail the notice to all persons that they have on their list may, indeed, be considerable, and I believe that it's a --

THE COURT: What is it? It may be, it may not be.

MR. DRURY: Well, it's labor intensive. They have to get it, they have to retrieve the information. They have to send it out. They have to get it back. They have to report to counsel and to the Court.

THE COURT: They certainly have their own customer lists.

MR. DRURY: They may, or they may have to create their customer lists. I don't know.

THE COURT: I don't know either.

MR. DRURY: I don't know that to be the fact. But what I do -- our position is that would be an undue burden and unreasonable and unnecessary under the circumstances of this case.

Now, I've heard a lot from Mr. Bonnor about his 15 years experience and all the cases he's had. But it seems interesting that in his research he only came up with one case with respect to the subpoena. He's come up with no cases that controvert that we have put forth to the Court the best notice practicable under the circumstances. And simply put, he wants to be part of the case and get in on the settlement. That's the only reason he's here. That's why he's here. All his cases that he talks about -- I have 37 years of experience. I've tried criminal cases, federal cases, criminal and state. I've argued 47 appeals.

THE COURT: I don't think I need to hear about the competence of counsel.

MR. DRURY: Well, I'm just saying that because he's suggesting that he should be lead counsel based upon his resume. I think his resume falls flat, can't compare to mine or Mr. Smith's. I've been to the United States Supreme Court. I doubt if he has. But I'm not here to pat myself on the back. I don't need to. I believe my resume and my colleagues and people who know me know what I've done and know what I can do.

But getting back to his argument, Judge, we believe that the notice that's out there is the best notice practicable under the circumstances. It meets constitutional requirements.

The Malane case, Agent Orange and In Re: Compact Disk all say that publication is fine. I don't know where counsel is coming from when he contends and argues that individual notice is mandatory. That's not the law, and that isn't the case.

But what I would ask is that your Honor preliminarily approve this settle, approve the notice package, if you will, that we presented to the Court, and appoint myself and Mr. Smith as co-lead counsel, Mr. Mullaney, who is already liaison counsel. And should your Honor decide that at this juncture, for whatever reason -- and I hope this isn't the case -- you're not going to approve the settlement as presented, I would also ask that at this time that in the interim, because it's been six months since we initially asked to be appointed interim counsel, that Mr. Smith and myself, indeed, be appointed interim counsel. Thank you.

THE COURT: All right. Does defendant wish to address any aspect of the notice argument?

MR. BLOCKER: Yes, your Honor. Can I address three small points, your Honor.

First of all, your Honor asked what is the number of book retailers. I don't actually know the exact number, but let me tell you how you can estimate it, your Honor. We turned over a printout to the plaintiffs that is a list of all of our sales of the book by publisher or by retailer, and the list is 67 pages long, and I think there are about 50 or 60 entries on every page. So order of magnitude that will give you an idea there are a large number of book retailers throughout the country that we deal with.

Second, I want to address Mr. Stone's point that nobody reads the publication notices. First of all, Judge, I don't think that's true at all. I've been involved in a number of settlements where publication notice was the only means of communicating with the class, and those generated a large number of responses.

And, second, even if we were to take Mr. Stone or Mr. Bonnor's point, you know, point blank and assume that nobody reads them, this case is different. Because unfortunately for Random House, this case gets a lot of free publicity. The events surrounding the publication and the marketing of A Million Little Pieces have been very much in the press. There was an article published on the internet only a few weeks ago. And once the publication notice hits the U.S.A. Today and Parade, items that in which they're going to be published, you can be sure that even if they are not read by tons of class members -- and I'm sure they will be anyway -- that there's going to be a lot of free publicity pointing out that there is a settlement, people can get cash. And in designing the notice program, your Honor, that was specifically taken into account.

One thing the plaintiffs have already pointed out is as part of designing notice program, neither the defendants nor the plaintiffs did this on their own. We got together, we engaged Rouse Consulting, who is an expert at doing these sort of programs. They got another entity involved called Concella Communications, whose whole mission is to design effective publication notice programs. We spent a lot of time with Concella trying to make sure that whatever publication notice program was put in place was reasonably calculated to reach the -- a large percentage of the class. And so this wasn't done on our own, and I'm not standing up and pretending to be an expert on it. But I can assure you the parties did go to somebody we do deem to be an expert and try and do the best job that we possibly could.

And the last point, your Honor, is I don't want to belabor the First Amendment issue. If your Honor has any questions, I'm happy to address them. It's an issue that --

THE COURT: Well, I don't see a First Amendment issue in the hypothetical category of Barnes & Noble agreeing to distribute the notice to its own customers.

MR. BLOCKER: Well, I guess -- I agree with you.

THE COURT: I don't know whether that's feasible or practicable. I'm not sure if there's a record on that, that issue. But I don't see a First Amendment issue here.

MR. BLOCKER: Well, obviously, your Honor, if they want to do so on their own, if they make a voluntary decision, I guess they're making a First Amendment decision for their customers. My hunch would be, and the reason we filed the --

THE COURT: They're not really disclosing anything that they don't already know.

MR. BLOCKER: No, but they're telling their customers.

THE COURT: That they know.

MR. BLOCKER: Yes, that they do know. So there is some of that.

But I guess the one concern I have with the program you were describing with Mr. Drury is the following. If the plaintiffs' counsel sends a letter to Barnes & Noble and says we'd like you to do this, that at least has some of the Court's imprimatur on it. It might not be a subpoena. It might not say at the top, subpoena, you must do the following. But if I'm Barnes & Noble, and I'm the in-house lawyer for Barnes and Noble and get that, I'm going to have to make a decision, am I going to be dragged into court if I don't do this, I'm --

THE COURT: Well, they may want to do it. They may say this is a service to our customers.

MR. BLOCKER: They may want to do it, that's possible, your Honor. But it puts them in a very difficult position because if they don't do it, and it does carry -- when the plaintiffs appointed by the Court ask Barnes & Noble to do that, it carries the imprimatur, even if it's indirect, of the Court and is, essentially, tantamount to the same sort of subpoenas that we're concerned about. And the reason we're concerned about the issue, Judge, is it's not us today, but in the next action down the road, you know, you setting a precedent that this can or should be done, is something that could come back in another class action that we are not a party of and somebody asking us to do exactly the same thing. So we do care a lot about it and I think there is sort of an indirect imprimatur if you even have the plaintiffs' counsel ask the Barnes & Noble of the world to send out --

THE COURT: Well, there is a distinction between Barnes & Noble, which is a party to the litigation, and the retailer that's not a party to the litigation.

MR. BLOCKER: It's -- there never was a consolidated amended complaint filed, your Honor, because we reached a settlement before that took place. But I have no idea if they would have been part of any consolidated amended complaint. They certainly were named in some of the underlying cases that were transferred to your Honor.

THE COURT: Right.

MR. BLOCKER: But --

THE COURT: Somebody thought it was a good idea to put them in --

MR. BLOCKER: Yeah.

THE COURT: -- in one release.

MR. BLOCKER: But I think your Honor hit the nail on the head. I mean, I think these entities perceive they have absolutely no exposure or at least none that they couldn't lay off on the publisher. And so, you know, that's why we want them out, but they don't really -- they are not parties in the true sense. They're not currently named in any consolidated amended complaint. And at the end of the day, I'm not sure that makes any difference because they're not settling defendants, they're not settling parties. They're not asking to be part of the settlement. We just want them in there because we want to buy absolute peace at the end of the day.

THE COURT: All right.

MR. BLOCKER: I don't have anything else to add, unless your Honor has any other questions.

THE COURT: No. I'll tell you, tell the parties where the Court stands.

First of all, the Court appoints Mr. Drury and Mr. Smith as co-lead counsel under Rule 23(g). Based on their prior experience and the work they've done in this case, I think they are best able to represent the interests of the class in this matter, and the Court, for much the same reason, continues Mr. Mullaney as liaison counsel.

I think, having reviewed the papers and listening to argument, there is no question in my mind that the amount of the settlement is, on a preliminary basis, within the range of fairness and reasonableness given the very significant legal issues and mountains that the plaintiffs would have to climb to succeed here, first on the class motion, and then on the merits. So I have no problem concluding that the amount of the settlement is within a reasonable range.

I also believe that, contrary to Mr. Bonnor's suggestion, that notice can be an effective method of publication, effective method of notice in many cases.

I have some hesitancy, however, as the parties may have inferred from my questions, that the plaintiffs -- settling defendants and the plaintiffs have explored the feasibility of expanding the notice program to request large retailers, and I divide them into two categories: Party defendants, such as Barnes & Noble and non-party defendant, probably worthy of separate analysis, but whether or not it's feasible to request of them to distribute notice to their customers. I have no idea whether Barnes & Noble would be willing to do this, what the cost would be and who would shoulder the cost. Those are all relevant factors. As I say, they probably cut differently for parties and non-party retailers, and so I'm not going to rule on the motion for approval of the settlement at this juncture.

The class certainly is an appropriate settling class, but I'm going to simply defer, until I receive supplemental submissions by the parties, on the feasibility of retailer participation and notice. I think it's a given that all parties want broad notice that's feasible, and so there really aren't conflicting goals among the parties here, including the party represented by Mr. Bonnor.

How much time does counsel want to make a supplemental submission to the Court on this issue?

MR. DRURY: Your Honor, the plaintiffs -- I don't know if defendants -- 14, 21 days would be sufficient.

THE COURT: All right.

MR. DRURY: Either one, Judge.

THE COURT: All right, 21 days it'll be. Which brings us to when, Mr. Donald? Today is the 6th, is that right? So April 27th. And I suggest that the settling parties meet with Barnes & Noble and -- at a minimum, and see where things lie. I form no views as to where I'll come out on the notice issue ultimately, and have no predisposition.

Anything further we should address this morning, counsel?

MR. BONNOR: Could I just briefly, your Honor, address the issue of who should be contacted. I think that, as I said, it's a very concentrated industry. You have Barnes & Noble at approximately 15 percent, you have Borders at approximately 14 percent. I don't know what Amazon.com's percentage is, but it's got to be fairly large, and Walmart's one of the biggest book retailers, and I think at least with these four you could probably cover 50 percent of the class here. It wouldn't be any more burden on these people to meet or to address this issue with those four, and I think that would be very helpful to the members of the class.

THE COURT: All right, I'm not going to determine who should contact whom. I'm going to leave it up to the judgment of counsel for the settling parties to take a reasonable approach to preparing a response to the Court's inquiry.

MR. MEYER: Judge, just so I'm clear in my mind, we'll have a hearing on the 27th?

THE COURT: No. I'm asking for a written submission by the 27th, and then I'll advise the parties after reviewing their submissions what the appropriate next step will be.

MR. MEYER: Thank you.

MR. DRURY: Your Honor, one more point. I didn't hear your Honor mention who the class representatives would be. Mr. Smith and myself are class counsel. Do we need to -- does your Honor wish to address that question now who the class -- all the named plaintiffs or just the named plaintiffs for Mr. Smith and myself.

THE COURT: I don't think I need to resolve that. Frankly, I assumed that the class representatives would be the clients that the two of you represent.

MR. DRURY: All right, thank you.

THE COURT: Anything further, counsel? All right, we're adjourned.

THE DEPUTY CLERK: All rise.

(Adjourned)